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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

MIKE CARDILLO,

Plaintiff and Respondent,

v.

PATRICIA BIGORNIA,

Defendant and Appellant.

H044172

(Santa Clara County  
Super. Ct. No. CV240198)

Appellant Patricia Bigornia appeals from the trial court’s postjudgment order denying her Code of Civil Procedure section 473, subdivision (b) (section 473(b)) motion to vacate a judgment that respondent Mike Cardillo<sup>1</sup> had obtained against her after she failed to appear at trial. The court found that Bigornia’s motion “failed to meet her burden to establish that a Judgment was taken against her as a result of her mistake, inadvertence, surprise or excusable neglect or . . . by extrinsic fraud.” On appeal, Bigornia contends that the court abused its discretion in denying her motion. We find no abuse of discretion and affirm the court’s order.

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<sup>1</sup> Cardillo died during the trial court proceedings, and his wife replaced him as his successor-in-interest. We refer to Cardillo for convenience.

## **I. Background**

Cardillo brought an action against Bigornia after she failed to repay two loans that he had made to her. On January 21, 2016, Judge William Elfving granted Bigornia's trial counsel's motion to withdraw as her attorney. Shortly thereafter, Bigornia was properly notified by both Cardillo's trial counsel, David Kraft, and her former trial counsel that the trial setting conference would be held on February 16 at 11:00 a.m. Kraft's January 22 letter to Bigornia notifying her of the February 16 hearing also informed her that Kraft would be asking the court to set the trial for April 25, 2016.

Bigornia did not appear at the February 16, 2016 trial setting conference. Kraft was present, and Judge Elfving set a court trial for May 16, 2016. Notice of the trial date was served by mail on Bigornia on April 15, 2016. Bigornia did not appear at the May 16, 2016 trial, which was before Judge James Stoelker. After a trial that lasted about 15 minutes, the court entered a \$297,967.13 judgment for Cardillo against Bigornia. The court's written judgment included numerous findings of fact.

In August 2016, Bigornia, now represented by counsel, filed a section 473(b) motion to vacate the judgment. She claimed that her failure to appear at trial was due to her mistake, inadvertence, or excusable neglect. Bigornia declared that she had come to the courthouse and been present in "Department 3" from 9:00 a.m. on February 16 until just after 11:00 a.m. She claimed that she never saw Kraft and the case was never called. Bigornia declared that the judge sitting in "Department 3" left the bench shortly before 11:00 a.m. After the judge left the bench, she spoke to the bailiff, who told her that no other cases were on the court's morning calendar, her matter "had probably been rescheduled," and she could expect to receive "written notice" of the rescheduled conference. Bigornia waited a few more minutes, until shortly after 11:00 a.m., and then left.

Bigornia declared that, a week after the conference, she sent a letter to Kraft explaining that she had been present in court but had never seen him or his client, and telling him that she would be leaving the country on April 13, 2016, and would notify him when she returned to the country. Bigornia declared that she left the country on April 13 and did not return until June 20. On June 25, she received all of the mail that had accumulated in her absence, including notice of the trial date and notice of the judgment against her.

Cardillo opposed the motion. Kraft declared that he had been present in Department 3 from 10:50 a.m. until 11:15 a.m. on February 16, 2016, and Bigornia was not present at any time. At “approximately 11:00 A.M.,” the case was called by the judge for the trial setting conference, and the case was set for May 16. Kraft did not receive any letter from Bigornia a week after the conference. Instead, he received a letter from her over a month later in which she refused to attend her scheduled deposition and told him that she was “leaving the country” and would contact him when she returned. Because she had frequently claimed during the litigation that she was out of the country, he did not credit her assertion. Her letter, postmarked March 18, 2016, which Kraft attached to his declaration, did not purport to identify the time period during which she would be out of the country.

Bigornia replied to Cardillo’s opposition with declarations from herself and her nephew detailing how she had arranged for him to drive her to the courthouse on February 16, 2016 and how he had done so.

Bigornia’s section 473(b) motion was heard and denied on September 13, 2016 by Judge Elfving.<sup>2</sup> On October 4, 2016, she moved for reconsideration based on her belated acquisition of cell phone records supporting her claim that she had communicated with

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<sup>2</sup> Bigornia chose to proceed in this appeal without a reporter’s transcript of that hearing.

her nephew's cell phone on February 15 and 16, 2016, as she and her nephew had claimed in their declarations. Her motion for reconsideration was denied, and she timely filed a notice of appeal.

## II. Analysis

Bigornia sought relief under the discretionary provisions of section 473(b). “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” (§ 473(b).) She claimed that her absence from the trial was due to her mistake, inadvertence, or excusable neglect. Bigornia contends that the trial court was *required* to grant her section 473(b) motion because *her declarations* supported her claim.

A party seeking discretionary relief under section 473(b) bears the burden of showing “‘a satisfactory excuse for the occurrence of that mistake.’” (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196.) “‘The court must generally consider the facts and circumstances of a case to determine . . . whether the reasons given for the party’s mistake are satisfactory.’” (*Ibid.*) To determine whether the mistake or neglect was excusable, “the court inquires whether ‘a reasonably prudent person under the same or similar circumstances’ might have made the same error.” (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.)

“Generally speaking, the trial court’s ruling on a discretionary motion for relief is reviewed for an abuse of discretion. [Citation.] But ‘because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations].’ [Citations.] For that reason, ‘a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.’” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419-1420.) “Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails.” (*Elston v.*

*City of Turlock* (1985) 38 Cal.3d 227, 235.) Nevertheless, it is the superior court's role "to assess credibility and resolve any conflicts in the evidence" when it rules on a section 473(b) motion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.) "[A] trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit." (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 149.)

Bigornia's appellate contentions are premised on her declarations, but the superior court was not required to credit any part of her declarations. Bigornia insists that her declarations were "undisputed . . . ." This is simply untrue. Kraft's declaration and the exhibits attached to it disputed the key assertions in Bigornia's declarations. Bigornia declared that she was present in Department 3 on February 16, 2016 at the time set for the trial setting conference, Kraft was not there, and the conference did not take place. Kraft declared that he was present in Department 3 on February 16, 2016 at that time, Bigornia was not there, and the conference did take place. The superior court minute order reflected that the conference took place in Department 3 at the scheduled time and that Kraft was present. The superior court did not abuse its discretion in crediting Kraft's declaration and the minute order over Bigornia's conflicting declaration.

Bigornia claims that even if she was not present for the conference her absence was excusable. Bigornia was notified well in advance and multiple times of the scheduled time, location, and importance of the conference and told that at this conference Kraft would be asking the court to set the trial for April 2016. A reasonably prudent person would have understood the importance of attending this conference and would have attended it. This is particularly true of a person who had plans to be absent when the trial was requested to be set. The superior court could reasonably conclude that Bigornia's failure to attend the conference was inexcusable.

Bigornia maintains that her letter to Kraft demonstrated her diligence in attempting to ensure that she attended the trial. She declared that she had written to Kraft

a week after the conference, asked him what had occurred, and notified him that she would be leaving the country on April 13, 2016. Kraft, on the other hand, produced her letter, which had been sent more than a month after the conference. Her letter did *not* ask about the trial setting conference. Instead, her letter was primarily concerned with her refusal to attend her deposition or provide discovery. It also said she was “leaving the country for some medical reasons,” *without identifying any dates*, and “when I get back I will contact you.” The superior court did not abuse its discretion in discrediting Bigornia’s declaration regarding her letter and concluding that her failure to learn of the trial date was due to her failure to act in a reasonably prudent manner.

Bigornia contends that she established that her failure to attend the trial was due to her excusable neglect because she declared that she had “failed to receive actual notice of the trial date.” However, the record established that Bigornia had been properly served with notice of the trial date. While she claimed that she did not actually receive the notice until after the trial, the superior court could reasonably discredit this claim, particularly in light of the multiple discrepancies in Bigornia’s declarations.

Bigornia relies on the general rule that favors a trial on the merits and disfavors a trial by default.<sup>3</sup> However, this general rule does not deprive courts of their discretion to determine whether a litigant’s conduct has been inexcusable. Here, the superior court’s determination that Bigornia’s conduct was inexcusable was not an abuse of the court’s discretion because a reasonably prudent person would not have failed to attend the trial setting conference, failed to find out when the trial was set, and, knowing that it was likely to be set in late April, made no effort to find out when the trial was set and

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<sup>3</sup> Bigornia repeatedly refers to the judgment as a “default judgment.” The judgment was not a *default* judgment. This action was resolved at an *uncontested trial* that Bigornia failed to attend.

allegedly left the country so as to render herself unavailable to attend the trial. We find no abuse of discretion in the superior court's denial of Bigornia's section 473(b) motion.

### **III. Disposition**

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Grover, J.

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